International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Company) ***and*** **Charles Hillstrom.** Case 13–CB–16499–1

March 18, 2002

ORDER GRANTING MOTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, COWEN, AND BARTLETT

The issue here is whether to accept a late-filed brief under the excusable neglect provision of Section 102.111(c) of the Board's Rules and Regulations. We have decided to grant the Respondent's motion and accept its brief in light of the Board's decision in *Postal Service*, 309 NLRB 305 (1992), which has never been expressly overruled. However, we believe that the Board's decision in that case is inconsistent with later published and unpublished Board decisions, as well as with the Supreme Court's analysis of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), which has guided the Board's recent decisions. We therefore overrule the *Postal Service* decision and clarify that the miscalculation of a filing date, absent a showing of extenuating circumstances, does not constitute excusable neglect under Section 102.111(c).

We also announce the Board's intention to enforce strict compliance with the requirement of Section 102.111(c) that the specific facts relied on to support a motion to accept a late filing shall be set forth in affidavit form and be sworn to by individuals with personal knowledge of the facts. The signature of an attorney on the motion will not be treated as a substitute for the required affidavit.

Factual and Procedural Background

On September 21, 2001,[1] Administrative Law Judge Jerry M. Hermele issued his decision and, on that same date, the proceeding was transferred to the Board. Although the time periods for the filing of briefs to the Board following an administrative law judge's decision are described in Section 102.46 of the Board's Rules and Regulations, the transfer order contains a notification of the specific date that exceptions to the administrative law judge's decision must be received by the Board. In this matter the parties were notified that the due date for the filing of exceptions was October 19. Counsel for the General Counsel filed timely exceptions and brief in support of exceptions.

Pursuant to Section 102.46(d)(1) of the Board's Rules, a party opposing the exceptions may file an answering brief to the exceptions within 14 days from the last date on which exceptions may be filed. In this matter such an answering brief was due on Friday, November 2. Respondent's answering brief was dated and mailed on November 2 and arrived in Washington, D.C., on November 5.

By letter dated November 15, from the Associate Executive Secretary, Respondent was notified that its answering brief was rejected as untimely. The letter noted that the answering brief was due on November 2, was dated and mailed by Respondent on November 2, and was received on November 5. Further, the letter reiterated that Section 102.111(b) of the Board's Rules specifies that when a filing is required, the Board must receive the document by the last day of the time limit.[2] Although the "Postmark" rule provides an exception,—i.e., if the document to be filed is postmarked the day before the due date, or earlier, it is timely regardless of when it arrives at the Board,—the Rules note that "documents which are postmarked on or after the due date are untimely."

On December 10, the Respondent, citing the excusable neglect provision of Section 102.111(c) of the Board's Rules,[3] filed a motion seeking the Board's permission to file the late brief. The only grounds relied on are that Respondent's counsel

> mistakenly calculated the 14 days to include November 3, a Saturday, accordingly, he believed that the brief was due on Monday, November 5. The brief was transmitted by overnight delivery service on November 2, resulting in the brief being 1 business day late.

The foregoing "facts" were stated in the motion, but were not sworn to in an affidavit as required by Section 102.111(c). No other party has responded to the motion.

[1] All dates herein are 2001 unless otherwise noted.

[2] Copies of Sec. 102.111 describing the proper filing and computation of time, Sec. 102.114 on the service of papers, and Sec. 102.46 on the briefing requirements are enclosed with the transfer order and provided to all parties.

[3] "In unfair labor practice proceedings, motions, exceptions, answers to complaint or a backpay specification, and briefs may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result. A party seeking to file such motions, exceptions, answers, or briefs beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. . . ."

Analysis

Because of a perception of conflicting Board case law in this area, perhaps compounded by our practice of usually ruling on such motions in unpublished decisions, we have decided to clarify our position on miscounting as an excuse for late filings.

Originally, the Board followed Section 10(e) of the Act[4] and accepted only those late filings that were caused by "extraordinary circumstances." Eventually, however, this exacting standard was eroded to the point that the United States Court of Appeals for the District of Columbia Circuit characterized it as a "sometimes-yes, sometimes-no, sometimes-maybe policy . . . ."[5] In 1986 the Board adopted Section 102.111(b) of the Rules, in its present form, to comply with the D.C. Circuit's suggestion to put in place a "strict rule that requires filings to be in hand on the due date . . . with specific stated exceptions."[6] The "postmark rule" was the one exception the Board crafted to the requirement that filings be in hand on the due date.

Thereafter, in 1992, the Board added its "excusable neglect" provision to its Rules. In explaining the Rule, the Board made the following statement (56 Fed. Reg. 49141, September 1991):

> At present, the rules of the National Labor Relations Board make no provision for the late filing of documents. The Board has concluded that it would be appropriate to include in Section 102.111 a formal basis for accepting certain late-filed documents in unfair labor practice cases . . . .
>
> Under the new rule, the standard for permitting late filings of documents in unfair labor practice cases is "excusable neglect," a standard presently found in Fed. R. Civ. P. 6(b). No attempt is made to define the myriad situations to which the rule might apply. Rather, this is a matter that is to be left to determination on a case-by-case basis. The provision applies only if no undue prejudice would result from the late filing.

In *Postal Service*, 309 NLRB 305 (1992), the Board relied on the new rule to allow the filing of a late answering brief. In that case, the respondent's answer to cross-exceptions was due on June 10. The respondent alleged that it miscalculated the due date as June 11. The answering brief was placed in overnight mail on June 10 and received by the Board on June 11. Subsequently the filing was rejected by the Executive Secretary. The respondent contended that clerical errors or similar inadvertent actions, like miscalculation, establish excusable neglect. The Board concluded that a "one day arithmetic error in the calculation of a due date is not so inexcusable as to warrant the rejection of the document, at least where, as here, there has been no prejudice to any party."

The following year, however, the same Board majority decided that a misreading of the rule resulting in an answering brief filed 4 days late was not excusable neglect. *United Parcel Service*, 312 NLRB 595 (1993). There, the respondent thought, contrary to the Rules, that it had 14 days from receipt of the exceptions to postmark its answering brief. The Board decided that this misreading did not constitute excusable neglect because this would make the rule a nullity.

The same year, the Supreme Court also issued its decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). The Court in that case defined "excusable neglect" as that phrase is used in other rules. It concluded that a determination whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These circumstances included the danger of prejudice to the nonmoving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Id. at 395. With respect to the reasons for the delay, the Court stated that although excusable neglect is an elastic concept under Rule 6(b) of the Federal Rules of Civil Procedure, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Id at 392.

Following *Pioneer*, courts have recognized that the factors listed in that decision do not carry equal weight, and the excuse given for the late filing must have the greatest import.[7] Courts have also held that mistakes in construing the rules or calculating the time for filing do not generally constitute "excusable" neglect.[8]

Consistent with *Pioneer* and these court decisions, the Board has generally held that inattentiveness or carelessness, absent other circumstances or further explanation,

[4] "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[5] *NLRB v. Washington Star Co.*, 732 F.2d 974 (D.C. Cir. 1984).

[6] Id. at 977.

[7] See, e.g., *Hospital Del Maestro v. NLRB*, 263 F.3d 173 (1st Cir. 2001); and *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457 (8th Cir. 2000), cert. denied 531 U.S. 929 (2000).

[8] See id. See also prior to the *Pioneer* decision, *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992) (miscalculating time requirements for filing notice of appeal not "excusable neglect" under Rule 4(a)(5) of the Federal Rules of Appellate Procedure.).

will not excuse a late filing. However, the Board has done so in unpublished decisions. Further, the Board has never indicated that parties should no longer rely on *Postal Service*. Although the Board's 1993 decision in *United Parcel Service*, supra, can be interpreted as overruling *Postal Service*, the Board did not specifically state that such was its intention. Indeed, many parties continue to cite *Postal Service* as warranting acceptance of a 1-day late brief. Finally, the Board has not strictly enforced the requirement that a motion to file out of time be supported by affidavit.

We have decided to correct this today by expressly overruling *Postal Service* and clarifying the Board's policy. The Board's Rules, at Section 102.111, describe in specific detail how to count or compute the days in establishing the due date. Henceforth, a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date. Additionally, in all matters raising excusable neglect issues we will strictly adhere to our rule that the specific facts relied on to support the motion to accept a late filing shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. Failure to submit the facts in an affidavit will result in rejection of the Motion.

However, given the confusion and perception of ambiguity that the Board's past decisions and practice may have caused, we have decided to grant Respondent's Motion and accept its brief in this case.[9]

Dated, Washington, D.C. March 18, 2002

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
William B. Cowen,	Member
Michael J. Bartlett,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] In light of our decision to accept Respondent's answering brief in this case, and consistent with Sec. 102.111(c) of the Board's Rules, reply briefs responsive to the answering brief are due 14 days from service of this decision.